

***United States Court of Appeals
for the Second Circuit***



**INTERVENOR'S
REPLY BRIEF**

77-4028, 78-4047

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United States Court of Appeals

FOR THE SECOND CIRCUIT

ITT WORLD COMMUNICATIONS INC. and
RCA GLOBAL COMMUNICATIONS, INC.,

Petitioners,

—against—

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Respondents,

and

GRAPHNET SYSTEMS, INC.,
TELENET COMMUNICATIONS CORPORATION,
WESTERN UNION INTERNATIONAL, INC., and
TRT TELECOMMUNICATIONS CORPORATION,

Intervenors.

ON PETITION FOR REVIEW OF MEMORANDUM OPINIONS, ORDERS,
AUTHORIZATIONS AND CERTIFICATES OF THE
FEDERAL COMMUNICATIONS COMMISSION

**REPLY BRIEF OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.**

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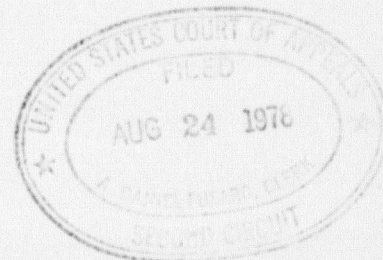


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Intervenors.

REPLY BRIEF OF PETITIONER
RCA GLOBAL COMMUNICATIONS, INC.

Petitioner RCA GLOBAL COMMUNICATIONS, INC. ("RCA Globcom") submits this brief in reply to the Answering Brief of the Respondent FEDERAL COMMUNICATIONS COMMISSION ("FCC" or "the Commission") and to the submission, supportive of the

Commission's Orders in suit,* filed by Intervenor GRAPHNET SYSTEMS, INC. ("Graphnet") and TELENET COMMUNICATIONS CORPORATION ("Telenet").

We also undertake to address a question which was posed in the briefs of Petitioner ITT WORLD COMMUNICATIONS INC. ("ITT Worldcom") and Intervenor TRT TELECOMMUNICATIONS CORPORATION ("TRT") and which has drawn a response from the Commission -- viz., the meaning of Communications Act § 222, added by 57 Stat. 5 (1943), as amended, 47 U.S.C. § 222 (1970 and Supp. V. 1975). It seems to us plain that that section (as distinguished from the discretionary structure which the Commission, over the decades, has erected upon its foundation) imposes no restrictions on the permissible scope of operations, domestic or overseas, of any carrier now before the Court -- or, indeed, of any carrier except The Western Union Telegraph Company, the only carrier to merge pursuant to that section's terms.

In particular, the Commission has attempted to counter the present proceeding's central issue of competitive fairness

* They are the Commission's Memorandum Opinion, Order, Authorization and Certificate ("the Decision") of January 11, 1977, 63 F.C.C.2d 402 (1977), and a Memorandum Opinion and Order ("the Reconsideration Order") of April 3, 1978, FCC 78-181, denying RCA Globcom's Petition for Partial Reconsideration of the Decision.

by attributing the international record carriers' ("IRCs") current "gateway" restrictions to Congress, rather than to itself. The attribution, however, is unsound, thereby impeaching the analysis by which the Commission arrived at its conclusion that Telenet and Graphnet should be uniquely authorized, among all record carriers, to provide both domestic and overseas services.

In the numbered points which follow, we comment, first, on the claims of the Decision's proponents that the Commission's grants of overseas operating authority to Telenet and Graphnet met an unmet public need, and, second, proponents' contention that the Agency adequately assessed the effects upon the IRCs and their services to the public of the unequal competition to which the Commission's Decision could expose the IRCs. These arguments do not depend upon the meaning of Communications Act § 222, and, if the proponents are wrong as to either one of them, the Decision should fall.

In the final point, we address the meaning of Section 222 and the significance of its proper construction for the issues of this case. If, as we believe, the Decision is defective for reasons unrelated to that statute's precise scope, this argument would become moot, and there would be no need to reach it.

POINT I

THE COMMISSION'S PIVOTAL CLAIM THAT
ITS GRANTS TO TELENET AND GRAPHNET
MET UNMET NEEDS IS UNSOUND

The Decision's proponents dwell at length on matters which are neither in dispute nor in point. Packet-switching and facsimile are useful communications techniques. Telenet and Graphnet have been offering them commercially within the United States since 1975 (G&T Br. pp. 4, 6) and have attracted increasing clienteles. Many of their customers (and customers of their domestic competitors, whom proponents tend to overlook) would like to make use of these and analogous techniques for communications to Europe and other areas of the world.

From this premise, the Commission has drawn (JA 5-6, 44*), and proponents now endorse (FCC Br. p. 18; G&T Br. p. 13), the conclusion which obviously is at the heart of the Commission's Orders in suit. By authorizing Graphnet and Telenet to extend their domestic networks to Europe, the Agency was acting to meet unmet public needs. And, for the sake of those needs, which the IRCs ostensibly were not meeting, the Commission could shatter, in a one-sided way and without careful study, the distinction which it has long drawn between the provision of domestic and overseas record services.

* "JA #" refers to pages of the Joint Appendix.

This "conclusion" is, we submit, a non-sequitur. There was, to be sure, an unmet need -- and, as our earlier papers show, RCA Globcom and other IRCs have been discharging that need with respect to many overseas points for a year or more and will be doing so with respect to many more in the near future. (RCA Gl. Br. pp. 35-38) But in 1976, when the Commission passed upon the applications for overseas authority filed by Graphnet and Telenet and concluded that they had won some kind of "race" with the IRCs, the Agency confronted nothing but the applicants' naked desire to meet that need. And such a desire is a far cry from a capacity to do so -- and thus to serve, in the words of Communications Act § 214(a), 47 U.S.C. § 214(a)(1970 & Supp. V. 1975), some "present or future public convenience and necessity."

It takes two -- a carrier "here" and a foreign carrier "there" -- to have an international telecommunications service, and Telenet and Graphnet did not have, and have yet to obtain, an operating agreement with any European correspondent indicating the latter's willingness and ability to implement the American domestic carriers' "plans".* In the absence of such agreements,

* The applicants' closest approach to such an agreement -- what Intervenor's brief calls an "informal understanding" (G&T Br. p. 5) -- is an exchange of correspondence between Telenet and the External Telecommunications Executive of the British Post Office ("BPO") which appears at JA 130-32 and

the Commission had before it, not means for meeting public needs, but merely applicants' visions. And such visions were entitled, we submit, to no special indulgence from the Commission because they materialized a few months before the IRCs' proposals (see RCA Gl. Br. pp. 33-38) for analogous services which were the product of lengthy discussions with, and capable of being implemented by, the affected overseas entities.*

The Commission tries to sidestep the non-existence of operating agreements by recasting the argument in categorical

(Footnote continued from preceding page)

150-51. The correspondence warrants the Court's attention. It appears that Telenet's proposals did not mesh very well with the extant packet-switching system of the United Kingdom, which still was experimental; took insufficient account of the "CCITT standards currently being developed"; involved circuit configurations the British were not prepared to accommodate; disregarded the BPO's understandable preference for diversely routed trans-Atlantic circuits (to protect against the occasional "outages" in the cables and satellites); and did nothing to meet BPO's desire "to provide access for U.K. customers to other domestic data networks in the United States in addition to Telenet." (JA 150-51)

- * As noted in our main brief (pp. 31-32), obtaining the prior agreement of the foreign terminal is the accepted method of introducing a new international telecommunications service to meet the mutual needs of users in the United States and abroad.

terms. An operating agreement is not, the Agency says, an imperative requirement for the grant of a Section 214 application in the overseas service.

To be sure, in isolated instances in the past, the Commission has granted authorizations to American carriers without agreements in hand, conditioning their exercise of the granted authority upon their production of satisfactory agreements at a later time. (See FCC Br. p. 22.) But in these rare cases nothing turned, as much did here, on the applicants' bare claim to a temporal priority. Nor was there any reason, in those cases, to doubt the applicants' ultimate capacity to implement the authority granted. In no case was the lack of agreement the result of the inability or unwillingness of the foreign terminal to implement the plans of the American carriers as reflected in their applications.*

* Thus in TRT Telecommunications Corp., 46 F.C.C.2d 1042 (1974), TRT received Section 214 authority to provide to the United Kingdom a conventional package of record services which it already supplied to many other countries and which several American carriers, including RCA Globcom, had been providing to Britain for years. At the time of the Commission's ruling, TRT had not concluded with the BPO an agreement for the division of the tolls for one of these proposed services, message telegrams. (See 46 F.C.C.2d at 1056.)

(Footnote continued on next page)

Graphnet and Telenet could envision in 1976 supplying services to Europe that RCA Globcom and other IRCs were not then supplying and could not supply until foreign correspondents were "ready" some months or a year later.* But, for all their "plans", the applicants could not supply them either. Thus the Commission, by granting Graphnet and Telenet the authority to do what they, as a practical matter, could not do, met no unmet public needs. The Decision in suit rests on a premise which is false and should be vacated.

(Footnote continued from previous page)

In American Tel. & Tel.Co., 18 F.C.C.2d 402 (1969), the Commission granted to RCA Globcom and several other United States carriers, which long had provided a joint television program transmission service to Europe via the INTELSAT satellites, blanket authority to provide similar service, through the same satellites, to several South American countries. (18 F.C.C.2d at 404)

The Commission also refers, in this connection, to Communications Satellite Corp., 1 F.C.C.2d 82 (1965). If operating agreements were involved in that proceeding the Agency's opinion does not reflect that fact. In any event, that Order merely involved a shift, from Comsat to AT&T and others, of operational responsibility for an existing service to Europe which was not, in other respects, changed. These "authorities" are to be contrasted with, e.g., Commercial Cable Co., 28 F.C.C. 283, 290 (1960), where the absence of an agreement was a persuasive indication that the applicant could not, in fact, provide its proposed service, and the Section 214 authorization was refused.

- * The telecommunications operating authorities of a majority of the world's countries are not, of course, "ready" yet, and some will not be for a long time to come.

POINT II

THE COMMISSION HAS NOT ADEQUATELY
JUSTIFIED ITS FAILURE TO GIVE DUE
REGARD TO THE COMPETITIVE EFFECT
UPON THE IRCs AND THEIR SERVICE
TO THE PUBLIC OF ITS GRANT

RCA Globcom's principal brief showed (at pages 10-18) that the Commission's Decision has authorized a radical, if selective, alteration in the long-established structure of the overseas record communications industry. By uniquely qualifying Graphnet and Telenet to provide both domestic and overseas service through unitary networks, while RCA Globcom (and the other IRCs) remain cooped up in a few "gateways", the Decision exposes the IRCs to highly unequal terms of competition. This will adversely affect their capacity to provide the public with data and facsimile services to all feasible overseas destinations and other essential services (e.g., telex) on a global scale.

We urged, as well (RCA Gl. Br. pp. 45-51), that the Commission had brushed off this problem in a few sentences (JA 7-8), failing to address it with the care that such a market-altering Order plainly requires. See, e.g., ABC Air Freight Co. v. CAB, 391 F.2d 295, 298-99 (2d Cir. 1968). This is not, as the Commission seems to think, a question of "ad hoc adjudication" vs. "rulemaking" (FCC Br. p. 24), but of the

Agency's failure to treat a serious problem seriously. As Judge Moore recently observed,

"The emphasis today . . . is on the requirements of the particular case, not on . . . the equally formalistic and often circular distinction between adjudication and rulemaking." RCA Global Communications, Inc. v. FCC, 559 F.2d 881, 886 (2d Cir.), modified on other grounds, 563 F.2d 1 (2d Cir. 1977).

The Commission argues that RCA Globcom's real grievance is the glacial pace of the "gateway" proceeding, Docket No. 19660, which the Agency has undertaken, since the first round of briefing here, to reactivate. (See FCC Br. p. 25.) That, to be sure, is a grievance and a substantial one. But it is not the one we press in this proceeding. We object to the inequality which the Decision in suit creates, and to the Commission's inattention to the likely effects of that Decision upon RCA Globcom's ability to serve the public.*

* The existence of another Docket, i.e., No. 19660, in which the Agency could study, with procedural economy, the relational effects of a pronounced change in industry structure does not excuse, rather it aggravates, the Commission's decision to act here without doing so. An examination of the Agency's various rulings in Docket No. 19660 (cited at RCA Gl. Br. pp. 16-18) will show that the Docket is a "difficult" one for the Commission because a change in the established demarcation between domestic and overseas record carriers would affect the domestic carriers and have consequences for them and the public which ought to be weighed. The reciprocal, we submit, is also true.

The Commission also would justify its inattention by saying: (a) RCA Globcom failed to quantify its likely harms with sufficient precision (compare JA 8 with FCC Br. p. 27); (b) the overseas services proposed by Telenet and Graphnet differ from most of those the IRCs offer (id. at p. 28); and (c) RCA Globcom can, in any case, interconnect with other domestic carriers (id. at p. 29). None of these arguments is, we submit, a valid response to our critique.

The first argument is a refusal to acknowledge a forest because it is not feasible to count the trees. The appearance on the North Atlantic of domestic carriers, which are not confined to a few "gateways", would create a new situation patently disadvantageous to the IRCs which are. If, by reason of novelty, precise prediction is not possible, judgment still is. And it has not been exercised.*

* The Commission invites attention to Graphnet Systems, Inc., 67 F.C.C.2d 1059, 1061 (1978), where, it is said, Western Union "came forward with concrete financial projections. . . ." (FCC Br. p. 27 fn. 17) There Western Union was concerned about a proposed transfer from it to Graphnet of partial responsibility for the "hinterland" delivery of a discrete and existing pool of incoming overseas telegram traffic. The proposed shift would have no effect on the convenience of traffic originators abroad. That case did not involve the variable of "consumer response". This one does.

The second argument overlooks the fact that the IRCs do provide, through interconnection, overseas services of the kind Graphnet and Telenet seek to offer directly. The Commission ignores the effects on the costs of serving less developed areas if the domestic carriers, with access to customers all over the country, can make substantial inroads on traffic to Western Europe. More importantly, the Commission also makes no attempt to evaluate the cross-elasticities between communication services and the capacity of Graphnet and Telenet to divert, by convenience of access, traffic now transmitted by the IRCs by other modes.* This danger is particularly acute in the case of facsimile.

The Commission, in its last argument, endorses interconnection as a fair alternative for the gateway-confined IRCs because "from the customer's point of view, it makes no difference whether the message is handled by one carrier or two interconnected carriers . . ." (FCC Br. p. 29). This analysis misconceives, we submit, the "customer's point of view". It probably is true that it makes no difference to a Telenet subscriber in, say,

* Cf. Application for Merger of Western Union Telegraph Co. and Postal Telegraph, Inc., 10 F.C.C. 148 (1943), where the Commission noted with approval the Congressional finding that the country's domestic telegram service had been brought to the brink of ruin in the 1930's by the competition of the telephone, TWX (a form of telex developed initially by AT&T), and air mail. (See id. at 162 fn.4.)

Phoenix whether his "packets" are taken beyond New York by Telenet or by RCA Globcom. But, if Telenet is able to implement its overseas authority, the choice the customer then will face will be Telenet vs. "X" plus RCA Globcom, where "X" is some other domestic carrier whose service may not be as convenient or desirable to that customer as that offered by Telenet.

RCA Globcom and the other IRCs would face, under the Order in suit, harshly unequal competition which could adversely impact their other services. The Commission's duty to examine and weigh that impact has not been discharged by the obiter on display here.

POINT III

THE COMMISSION'S DECISION IS FLAWED BY A MISPERCEPTION OF COMMUNICATIONS ACT § 222

The Commission, as we have seen, dismissed RCA Globcom's contention that it should not selectively override, in this case, its long-established distinction between the domestic and foreign overseas record spheres. In so doing, the Commission gave weight to a construction of Communications Act § 222, 47 U.S.C. § 222 (1970 and Supp. V. 1975), which seems to us plainly wrong.

A. The Commission's Use of Section 222

Referring to the IRCs' "gateway" confinement, the Commission said that their "possible competitive disadvantage" derives

"from restrictions which Congress imposed on the international telegraph carriers. We cannot refuse to authorize services [by Graphnet and Telenet] . . . merely because a potential competitor might arguably be restricted in the nature of his competitive response by provisions of the Act which Congress, in its judgment, has seen fit to impose on certain entities." (JA 8)

In its brief here, the Agency comments:

"The Commission noted that any difference in regulatory treatment of the IRCs arose from restrictions imposed by Congress when it enacted Section 222." (FCC Br. p. 9)

The Commission's assessment of the inter-carrier equities affected by its Decision was decisively influenced by a belief that the handicaps the IRCs will face, if Graphnet and Telenet appear on the North Atlantic, are of Congress' making, not its own. This, we submit, is wrong, and it renders arbitrary and capricious a Decision premised, in significant part, on such a mistaken belief.

B. The Commission's Erroneous Analysis

Commission discretion exercised, in the wake of and by reason of, the 1943 merger of Western Union and Postal Telegraph, pursuant to Communications Act § 222, has confined the IRCs to the "gateways". The statute itself does not. It does not preclude domestic operations by unmerged carriers which do a primarily international business any more than it precludes

international operations by unmerged carriers which do primarily a domestic business. The statute imposes mandatory operational constraints only on "consolidated or merged carriers", see Western Union International, Inc. v. FCC, 544 F.2d 87 (2d Cir. 1976), cert. denied, 98 S.Ct. 299 (1977) -- of which there is only one, Western Union.

The Decision seems to derive its notion that IRCs may labor under a Congressionally-imposed "gateway" confinement from a proviso which appears at the end of the definition, in Communications Act § 222(a)(5), of "domestic telegraph operations". (See JA 8 fn. 7.) The proviso specifies:

"[N]othing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of the same over its own or leased lines or circuits within the continental United States."

The Commission's apparent reading conflicts with other language of the statute; with the legislative history of the proviso, which shows it was designed to protect, not confine, the IRCs; with the industry's early history under Section 222; and with many later rulings by the Commission and this Court.

C. The Legislative History of Section 222

Section 222 was enacted during the Second World War. At that time, sixteen radio carriers, including RCA G. M., TRT, and a predecessor company of ITT Worldcom, were providing domestic telegraph service in competition with the essentially land-line facilities of Western Union and Postal Telegraph. See FCC, Seventh Annual Report for Year Ending June 30, 1941, p. 17 (1941).

In June of 1942 these domestic radio operations were shut down by the Board of War Communications,* see Board Orders Nos. 8 and 8A, 7 Fed. Reg. 4183, 5089 (1942), exercising, by delegation, Exec. Order 8964, 6 Fed. Reg. 6367 (1941); 3 C.F.R. 1033 (1968); the emergency powers conferred on the President by Communications Act § 606, 47 U.S.C. § 606 (1970).**

Section 222, at three places, expressly contemplates possible domestic operations by carriers doing principally an overseas business. See § 222(a)(2) (definition of "international

* The Board was created by President Roosevelt as the Defense Communications Board in September 1940, Exec. Order 8546, 5 Fed. Reg. 3817 (1940), 3 C.F.R. 741 (1968) and renamed in 1942. The Chairman of the FCC was the Board's ex-officio chairman. Other members were the Director of Naval Communications, the Chief Signal Officer of the Army, and Assistant Secretaries from the Treasury and State Department.

** The action appears to have been motivated principally by concern for communications security.

telegraph carrier"); § 222(b)(2) (authorizing a merged carrier to acquire "all or any part" (i.e., less than all) of the domestic properties and operations of an international carrier); and § 222(e)(4) (relating to the formula for the distribution of overseas traffic filed with a merged domestic carrier).

The proviso now contained in Section 222(a)(5)'s definition of "domestic telegraph operations" was added to the bill, S. 158 of the 78th Congress, which became Section 222 when the measure was in conference.* The statement of the House managers, set out in the Conference Report, H.R. Rep. No. 142, 78th Cong., 1st Sess. (1943), explains it as follows:

"This proviso is the same as the one contained in the definition in the Senate bill, except that the words 'under regulations prescribed by the Commission' have been inserted. It was felt desirable to include this proviso, in order clearly to permit carriers to continue the operations referred to, because of the requirement (in subsection (c)(2)) that in case of a consolidation or merger of domestic telegraph companies the plan of consolidation or merger shall provide for the divestment of the international telegraph operations theretofore carried on by any party to the consolidation or merger." (At p. 10)

The point of the proviso was not to contain the IRCs, but to insure that their right to operate in "gateways" could not be

* Unlike some unenacted telegraph merger proposals, considered by earlier sessions of Congress, which would have authorized mergers of both domestic and international carriers, S. 158 of the 78th Congress never included, in either chamber, an international merger proposal. See 89 Cong. Rec. 338 (1943) (remarks of Senator McFarland).

curtailed by reason of anything done in the discretionary implementation of Section 222.

D. The Experience Under Section 222

The industry's early history under Section 222 confirms this reading. Thus, on October 19, 1944, RCA Globcom wrote to FCC Chairman Fly, in his capacity as Chairman of the Board of War Communications, saying, inter alia:

"Prior to suspension of its domestic operations, RCAC maintained a domestic network serving twelve cities; namely, Washington, D. C., Baltimore, Boston, Chicago, Detroit, Los Angeles, New Orleans, Philadelphia, Seattle, New York, San Francisco, and Camden. This domestic network proved very valuable not only in handling a substantial volume of domestic telegrams at reduced rates, but enabled RCAC to pick up and deliver within the interior of the United States a large portion of its own international messages without handicap or resistance from our natural cable competitors then affiliated with the two landline communications organizations, Western Union and Postal Telegraph.

* * *

"In considering and planning our postwar program of operations, the status of our domestic system poses questions which can best be resolved only in the light of knowledge as to the probable length of time our domestic operations must continue inactive because of war conditions. It will be extremely helpful if we can have the views of the Board of War Communications as to when the war-time restrictions, imposed in June 1942, are likely to be removed."*

* Certified copies of the letters cited herein, obtained from the files of the Board of War Communications in the National Archives, are reproduced in an addendum at the back of this brief.

On October 31, 1944 Chairman Fly replied. Without mentioning Section 222, he wrote:

"This is to advise you that your letter of October 19, 1944, in regard to the domestic point-to-point operations of RCAC which are now inactive as the result of the issuance of Board Order No. 8 is receiving the attention of a special subcommittee with a view to determining whether it would be advisable to modify the Board's Order at this time. This study will extend to all domestic point-to-point operations of the various carriers, and will not be completed for several weeks."

Before the study could be completed Chairman Fly resigned. On December 7, 1944 Acting FCC and Board Chairman E.K. Jett wrote to RCA Globcom, saying

"This is in reference to your letter of October 19, 1944. . . . In this connection, the Board has given considerable study to this subject and has discussed the matter with the Office of Censorship from the standpoint of national security. On the basis of these studies, the Board does not feel that cancellation or modification of Order No. 8 prior to the ultimate defeat of both Germany and Japan, would be consistent with good communication security. . . . In any event, you will be advised promptly of any change in policy."

The IRCs' domestic services were not, in fact, revived in the post-war era. This reflected, not the requirements of Section 222, but the increasing demand, in the post-war period, for radio services of all kinds. Given the limited number of usable frequencies available under the technology of that time, the Commission thought they should be used for other purposes.

See Press Wireless, Inc., 11 F.C.C. 633, 637-38 (1946).

The Commission's discretionary management of the radio spectrum mooted for a long time thereafter any question of domestic service by the IRCs. But, in recent years, as advances in microwave and satellite transmission technologies have sharply reduced, if not totally eliminated, the frequency "shortage", the Commission again has recognized that Section 222 did not preclude domestic operations by international carriers. (See RCA Gl. Br. pp. 12-13 and cases there cited.*)

* E.g., Western Union International, Inc. v. FCC, supra at 90; RCA Global Communications, Inc., 42 F.C.C.2d 774, 779 (1973), aff'd sub nom. Network Project v. FCC, 511 F.2d 786 (D.C.Cir. 1975); Domestic Communications - Satellite Facilities (Second Report and Order), 35 F.C.C.2d 844, 851 (1972). See also International Record Carriers' Scope of Operations, 54 F.C.C.2d 532, 532-33 (1975); International Record Carriers' Scope of Operations, 40 F.C.C.2d 1082, 1086-87 (1973).

Most recently, in ITT World Communications, Inc., File No. I-T-C-2684 (Released July 19, 1978), Western Union filed a petition to deny ITT Worldcom's application to provide direct telex service between its United States "gateways" and subscribers of its correspondent in Mexico on the grounds, inter alia, that Section 222 limits the IRCs to accepting or delivering international telegraph messages in the "gateways." (§ 11) The Commission, rejecting this petition and granting ITT Worldcom's application noted:

"The legislative history of Section 222 demonstrates that the purpose of this section was to provide for the preservation of an efficient domestic telegraph system. The Commission's discretion to authorize new services to places considered domestic points in Section 222 by carriers other than Western Union was not circumscribed by this act. The prohibition on Western Union's ability to offer service to foreign points under Section 222(c)(2) may not be construed as a reciprocal prohibition on international record carriers." (§ 15; footnotes omitted)

It seems plain that a misperception of Section 222 flaws the Commission's Decision and requires its reversal.

CONCLUSION

For the reasons stated in this, and RCA Globcom's earlier, brief, the Decision of the Commission should be set aside.

Respectfully submitted,

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August 24, 1978



ADDENDUM

BOARD OF WAR COMMUNICATIONS CORRESPONDENCE

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

All to whom these presents shall come, Greeting:

In virtue of the authority vested in me by the Administrator of General Services, I
on his behalf, under the seal of the National Archives of the United States, that
reproduction(s) is a true and correct copy of documents in his custody.

SIGNATURE	
<i>Jerome Finster</i>	
NAME	DATE
JEROME FINSTER	July 12, 1978
TITLE	
Chief, Industrial and Social Branch	
NAME AND ADDRESS OF DEPOSITORY	
The National Archives Washington, DC 20408	

*copies of letter attached to
Memo to BWC dated 31 Oct, 1944*

R. C. A. COMMUNICATIONS, INC. *for information*



A SERVICE OF RADIO CORPORATION OF AMERICA

66 BROAD STREET

NEW YORK 4. N. Y.



*(see also
Agenda Item
No. 6(4) of
11/23/44 meeting)*

T. H. MITCHELL

VICE PRESIDENT AND GENERAL MANAGER

ADDRESS FOR RADIOGRAMS
"TELCORCA"

October 19, 1944

Hon. James Lawrence Fly, Chairman
Board of War Communications
Washington 25, D. C.

Dear Mr. Fly:

On May 28, 1942, the Board of War Communications (then known as Defense Communications Board) issued its Order No. 8 directing the closure of all point-to-point radiotelegraph circuits within the continental United States used in the fixed public radio services. This action was taken under the authority of Executive Order No. 8964 of December 10, 1941, after a determination by the Board that the national security and defense and the successful conduct of the war demanded the closure of such circuits.

In accordance with the aforesaid Order No. 8 the domestic point-to-point operations of R.C.A. Communications, Inc. within the United States were suspended at midnight on June 30, 1942. Order No. 8-A of the Board of War Communications, dated June 25, 1942, exempted from the closure provisions of Order No. 8 the transcontinental radiotelegraph circuits of RCAC between New York and San Francisco, and its ultra-high frequency control circuit between New York and New Brunswick, New Jersey. This exemption was conditioned upon such circuits being operated only for the domestic portion of the haul of foreign messages after censorship by the Office of Censorship at the first point of radio transmission within the United States. Those circuits are presently so operated.

Prior to suspension of its domestic operations, RCAC maintained a domestic network serving twelve cities; namely, Washington, D. C., Baltimore, Boston, Chicago, Detroit, Los Angeles, New Orleans, Philadelphia, Seattle, New York, San Francisco, and Camden. This domestic network proved very valuable not only in handling a substantial volume of domestic telegrams at reduced rates, but enabled RCAC to pick up and deliver within the interior of the United States a large portion of its own

Hon. James Lawrence Fly.

Page Two.

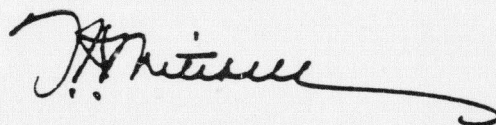
international messages without handicap or resistance from our natural cable competitors then affiliated with the two landline communications organizations, Western Union and Postal Telegraph.

RCAC developed its domestic operations over a period of some eight years. Its investment in station sites, plant and associated equipment approximated one million dollars. Since the closure of our domestic offices we have maintained sales representatives in the several cities to keep in contact with our customers. We still maintain practically intact our stations and associated equipment heretofore used for domestic operations. Our terminal telegraph offices were closed but can be reactivated at former or new locations when necessary.

In considering and planning our postwar program of operations, the status of our domestic system poses questions which can best be resolved only in the light of knowledge as to the probable length of time our domestic operations must continue inactive because of war conditions. It will be extremely helpful if we can have the views of the Board of War Communications as to when the war-time restrictions, imposed in June 1942, are likely to be removed.

We shall appreciate being advised concerning the matter at your earliest convenience.

Very truly yours,



cc: Major General Harry C. Ingles
Rear Admiral Joseph R. Redman
Hon. Herbert E. Gaston
Hon. Adolf A. Berle, Jr.
Captain E. M. Webster

RECEIVED
OCT 21 1944
WASHINGTON, D. C.
OFFICE OF THE
BOARD OF WAR COMMUNICATIONS

GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

to whom these presents shall come, Greeting:

in virtue of the authority vested in me by the Administrator of General Services, I
do hereby certify, on his behalf, under the seal of the National Archives of the United States, that
the reproduction(s) is a true and correct copy of documents in his custody.

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<i>Jerome Finster</i>	
NAME	DATE
JEROME FINSTER	July 12, 1978
TITLE	
Chief, Industrial and Social Branch	
NAME AND ADDRESS OF DEPOSITORY	
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GSA D 1973

Colonel T. H. Mitchell
Vice President and General Manager
R.C.A. Communications, Inc.
66 Broad Street
New York 4, New York

*see letter dated
7 Dec. 1944*

Dear Colonel Mitchell

This is to advise you that your letter of October 19, 1944, in regard to the domestic point-to-point operations of ECAC which are now inactive as the result of the issuance of Board Order No. 8 is receiving the attention of a special subcommittee with a view to determining whether it would be advisable to modify the Board's Order at this time. This study will extend to all domestic point-to-point operations of the various carriers, and will not be completed for several weeks.

Sincerely yours

James Lawrence Fly
Chairman

ELJ:fls/BWC
(10/31/44)

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GENERAL SERVICES ADMINISTRATION
National Archives and Records Service

all to whom these presents shall come, Greeting:

virtue of the authority vested in me by the Administrator of General Services, I
his behalf, under the seal of the National Archives of the United States, that
reproduction(s) is a true and correct copy of documents in his custody.

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GSA FORM
APR 68 6791

7 December 1944

Colonel T. H. Mitchell
Vice President and General Manager
R. O. A. Communications, Inc.
66 Broad Street
New York 4, New York

Dear Colonel Mitchell:

This is in reference to your letter of October 19, 1944, in which you make reference to BWC Order No. 8 directing the closure of point-to-point radiotelegraph circuits within the continental United States used in the fixed public radio service, and request advice in respect to the probable length of time your domestic operations must continue inactive because of war conditions. In this connection, the Board has given considerable study to this subject and has discussed the matter with the Office of Censorship from the standpoint of national security. On the basis of these studies, the Board does not feel that cancellation or modification of Order No. 8 prior to the ultimate defeat of both Germany and Japan, would be consistent with good communication security. Furthermore, the reopening of domestic point-to-point circuits would require the use of frequencies which are needed for communication with points which may not be served by wire facilities.

You will appreciate that the Board cannot determine at this time whether any unforeseen circumstance may alter the views expressed in the preceding paragraph. In any event, you will be advised promptly of any change in policy.

Sincerely yours,

(Signed) L. E. Jett

L. E. Jett,
Chairman.

EKJ:fls/BWC

See Closure of Stations, Circuits, etc.